

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

OMAR AVILA)	
Claimant)	
V.)	
)	
MITESH CONSTRUCTION, INC.)	Docket No. 1,068,185
Respondent)	
AND)	
)	
OWNERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and insurance carrier (respondent), through Matthew M. Hogan, of Overland Park, request review of Administrative Law Judge Thomas Klein's February 23, 2015 Order.¹ Terry J. Torline, of Wichita, appeared for respondent. W. Walter Craig, of Derby, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the June 10, 2014 preliminary hearing transcript, in addition to all pleadings contained in the administrative file.

ISSUES

At a February 23, 2015 prehearing settlement conference, the judge declined respondent's request to clear this case for a regular hearing.

Mr. Hogan argues the judge failed to follow his statutory duties to expeditiously set this matter for hearing and act impartially. Mr. Torline contends respondent is entitled to an expeditious hearing. Claimant maintains the Order should be affirmed and argues respondent's remedy is to request a dismissal three years after his application for hearing was filed.

The issue for Board review is: Does the Board have jurisdiction to review the Order?

¹ Claimant's counsel asserts Mr. Hogan has a conflict of interest with respondent and only represents the insurance carrier. Division records show Mr. Hogan represents both respondent and its insurance carrier.

FINDINGS OF FACT

Claimant alleged injuries occurring between December 27 and 30, 2013. He filed his application for hearing on January 8, 2014. A preliminary hearing Order issued on February 20, 2014 awarded claimant medical treatment and temporary total disability benefits.

On April 21, 2014, claimant was incarcerated. He was unable to attend his medical appointments. According to claimant's counsel, claimant was deported to Mexico on or about May 20, 2014, and has not returned to the United States.

Following a preliminary hearing, on June 20, 2014, the judge suspended claimant's temporary total disability benefits. Thereafter, respondent scheduled a prehearing settlement conference which was held February 23, 2015. Following the prehearing settlement conference, the judge issued the following Order:

This matter came on for a Pre Hearing Settlement Conference at the Respondent's request. The Respondent requests that the matter be cleared for Regular Hearing. Claimant's counsel attended the conference.

The relevant facts are these. Claimant was in the course of pursuing his workers compensation case when he was arrested and deported. He is naturally no longer able to appear personally and pursue his claim. The Respondent alleges prejudice due to the Claimant's absence and wants to proceed to Regular Hearing.

The Court declines to clear this matter for Regular Hearing under these circumstances.²

Thereafter, respondent filed a timely appeal.

PRINCIPLES OF LAW & ANALYSIS

K.S.A. 2013 Supp. 44-523 states, in part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.

...

² ALJ Order (Feb. 23, 2015).

(f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award . . . within three years from the date of filing an application for hearing . . . , the employer shall be permitted to file . . . an application for dismissal based on lack of prosecution. . . . The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

K.S.A. 2013 Supp. 44-551(l) states, in part:

(1) . . . All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days.

. . .

(2)(A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. . . .

The Board has jurisdiction to review decisions only to the extent provided in K.S.A. 2013 Supp. 44-534a(a), K.S.A. 2013 Supp. 44-551(l) and K.S.A. 2013 Supp. 44-555c(a). The Board does not have jurisdiction to hear respondent's appeal. The appeal is not from a preliminary grant or denial of benefits premised on a judge arguably exceeding his or her jurisdiction. The next question is whether this appeal concerns a final order or award, which would be synonymous with a final decision:

The term "final decision" has been construed to mean " 'one which finally decides and disposes of the entire merits of the controversy, and reserves no further questions or directions for the future or further action of the court.' " *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, 941 P.2d 371 (1997) (quoting *Gulf Ins. Co. v. Bovee*, 217 Kan. 586, 587, 538 P.2d 724 [1975]). This court has noted the term " 'final decision" is really self-defining. Obviously it is an order which definitely terminates a right or liability involved in the action, or which grants or refuses a remedy as a terminal act in the case.' " *Honeycutt v. City of Wichita*, 251 Kan. 451, 457, 836 P.2d 1128 (1992) (quoting 2 Gard's Kansas C. Civ. Proc.2d Annot. § 60-2102, Comments [1979]).³

³ *Flores Rentals, L.L.C. v. Flores*, 283 Kan. 476, 481-82, 153 P.3d 523 (2007).

The judge's Order was not a final order or award. The judge's Order was an interlocutory order which the Board lacks jurisdiction to review until it is contained in a final order or award. Even if the Board had jurisdiction, a judge's management of his or her docket is generally within his or her judicial discretion.⁴

CONCLUSION

The Board lacks jurisdiction to entertain respondent's appeal of an interlocutory order. The Board's authority extends no further than to dismiss the action.

WHEREFORE, the Board dismisses respondent's appeal of the February 23, 2015 Order.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein

⁴ "Generally, the Board will not interfere with judges' discretion in controlling their dockets." *Vargas-Jaramillo v. Marriott International, Inc.*, No. 241,554, 2001 WL 403320 (Kan. WCAB Mar. 9, 2001).